Supreme Court, U.S.
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No. 90-1938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE NEW YORK TIMES COMPANY,

Petitioner,

—v.—

LUTHER M. RAGIN, JR., DEBORAH FISH RAGIN, RENAYE B. CUYLER, JEROME F. CUYLER and OPEN HOUSING CENTER, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Should the Court grant certiorari to consider an interlocutory decision interpreting the Fair Housing Act that is in agreement with the only other circuit court decision on point, from which this Court recently denied certiorari, and that is supported by the applicable administrative regulations?

PARTIES BELOW

Pursuant to Rule 29.1 of the Rules of this Court, respondent Open Housing Center, Inc. informs the Court that it has no parent company and has no subsidiary other than Open Housing Services, Inc., a wholly-owned subsidiary.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS	1
COUNTERSTATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	4
I. RESPONDENTS' DISCRIMINATORY ADVERTISING CLAIM IS PLAINLY SUFFICIENT TO SURVIVE A MOTION TO DISMISS	4
A. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS	4
B. THE SECOND CIRCUIT'S DECISION IS SUPPORTED BY LONGSTANDING ADMINISTRATIVE INTERPRETATION	7
C. THE FIRST AMENDMENT DOES NOT SHIELD COMMERCIAL SPEECH THAT INDICATES A RACIAL PREFERENCE	8
II. REVIEW OF THE INTERLOCUTORY DECISION BELOW IS PREMATURE	10
CONCLUSION	11

APPENDIX **Page**

Exhibits to Complaint

Ex. 1 – Consent Agreement With The Washington Post 1b

Ex. 2 – The New York Times' Correspondence to Advertisers Regarding Its Advertising Acceptability Policy 13b

Ex. 3 – The New York Times' Standards of Advertising Acceptability 15b

TABLE OF AUTHORITIES

Cases	Page
American Constr. Co. v. Jacksonville, Tampa, and Key West Ry. Co., 148 U.S. 372 (1893)	10
Ashwander v. TVA, 297 U.S. 288 (1936)	10
Associated Press v. NLRB, 301 U.S. 103 (1937)	8n
Board of Trustees v. Fox, 492 U.S. 469 (1989)	9
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)	9
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	8
Cohen v. Cowles Media Co., 59 U.S.L.W. 4773 (U.S. June 24, 1991 No. 90-634)	8n
Fenwick-Schafer v. Sterling Homes Corp., No. R-90-1376, (D. Md. Mar. 28, 1991)	5, 7
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	7-8
Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916)	10
Housing Opportunities Made Equal v. The Cincinnati Enquirer, Inc., 731 F. Supp. 801 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir.)	5, 6, 10
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950)	10
Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990)	9-10
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	9
Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973)	9

Cases **Page**

Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 9

Ragin v. Steiner, Clateman and Assocs., Inc., 714 F. Supp. 709 (S.D.N.Y. 1989) 5, 6, 8, 10

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 10

Saunders v. General Services Corp., 659 F. Supp. 1042 (E.D. Va. 1987) 5, 6

Spann v. Colonial Village, Inc., 662 F. Supp. 541 (D. D.C. 1987), *rev'd in relevant part and remanded*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991) 5, 6

Spann v. Colonial Village, Inc., 124 F.R.D. 1 (D. D.C. 1988), *rev'd on other grounds and remanded*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991) 8

Spann v. Colonial Village, Inc., 899 F.2d 24 (D.C. Cir.), *cert. denied*, 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991) 5, 6

Spann v. The Carley Capital Group, 734 F. Supp. 1 (D. D.C. 1988) 5, 7

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 8

United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) 7, 8

Cases

Constitutional Provisions

U.S. Const. amend. I 1, 4, 8-9

Rules & Regulations

Federal Rules of Civil Procedure

Rule 12(b)(6) 3

Supreme Court Rules

Rule 29.1 ii

HUD Regulations

37 Fed. Reg. 6700 (1972) 7

45 Fed. Reg. 57102 (1980) 7

24 C.F.R. § 109.10 ..... 1, 5

24 C.F.R. § 109.16(a)(1) 1, 5

24 C.F.R. § 109.25(c) 1-2, 5, 7

24 C.F.R. § 109.30(b) 2-3, 5, 7

Statutes

Fair Housing Act

42 U.S.C. § 3601 (1982) 8

42 U.S.C. § 3604(c) (1988) (as amended) ..... *passim*

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The pertinent text of the First Amendment and the Fair Housing Act of 1968 (the "Act"), 42 U.S.C. § 3604(c) (1988) (as amended), is set forth in the Petition at 3.[1] Below are reproduced in full the relevant regulations issued by the United States Department of Housing and Urban Development ("HUD"), 24 C.F.R. Part 109 (1990):

§ 109.10 Purpose.

The purpose of this part is to assist all advertising media, advertising agencies and all other persons who use advertising to make, print, or publish, or cause to be made, printed, or published, advertisements with respect to the sale, rental, or financing of dwellings which are in compliance with the requirements of the Fair Housing Act. These regulations also describe the matters this Department will review in evaluating compliance with the Fair Housing Act in connection with investigations of complaints alleging discriminatory housing practices involving advertising.

§ 109.16 Scope.

(a)(1) Advertising media. This part provides criteria for use by advertising media in determining whether to accept and publish advertising regarding sales or rental transactions. Use of these criteria will be considered by the General Counsel in making determinations as to whether there is reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur.

§ 109.25 Selective use of advertising media or content.

The selective use of advertising media or content when particular combinations thereof are used exclusively with respect to various housing developments or sites can lead to discriminatory results and may indicate a violation of the Fair Housing Act. For example, the use of English

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1. The opinions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York are reported at 923 F.2d 995 (2d Cir. 1991) and 726 F. Supp. 953 (S.D.N.Y. 1989).

language media alone or the exclusive use of media catering to the majority population in an area, when, in such area, there are also available non-English language or other minority media, may have a discriminatory impact. Similarly, the selective use of human models in advertisements may have a discriminatory impact. The following are examples of the selective use of advertisements which may be discriminatory:

* * * *

(c) Selective use of human models when conducting an advertising campaign. Selective advertising may involve an advertising campaign using human models primarily in media that cater to one racial or national origin segment of the population without a complementary advertising campaign that is directed at other groups. Another example may involve use of racially mixed models by a developer to advertise one development and not others. Similar care must be exercised in advertising in publications or other media directed at one particular sex, or at persons without children. Such selective advertising may involve the use of human models of members of only one sex, or of adults only, in displays, photographs or drawings to indicate preferences for one sex or the other, or for adults to the exclusion of children.

§ 109.30 Fair housing policy and practices.

In the investigation of complaints, the Assistant Secretary will consider the implementation of fair housing policies and practices provided in this section as evidence of compliance with the prohibitions against discrimination in advertising under the Fair Housing Act.

* * * *

(b) Use of human models. Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly

> definable as reasonably representing majority or minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

COUNTERSTATEMENT OF THE CASE

1. Because this case arises on a threshold Rule 12(b)(6) motion to dismiss, there has been no discovery and the decision is interlocutory. The record is, therefore, ill-suited to plenary review by the Court of the broad legal issues The New York Times (the "Times") seeks to raise here.

2. Contrary to petitioner's assertion that respondents "did not allege a single fact, direct or circumstantial, indicating any intent on the part of The Times to convey any such discriminatory preference," Petition at 5, the Complaint alleges, among other things, that the Times has engaged in a lucrative, twenty-year practice of publishing racially exclusive real estate ads "featuring thousands of human models of whom virtually none were black," Complaint ¶¶ 8, 11, 12 (Pet. App. 48a, 50a); that those few Blacks who were depicted in real estate ads were portrayed in minor or subservient roles "as building maintenance employees, doormen, entertainers, sports figures, small children, or cartoon characters," rather than as potential homeowners or renters, Complaint ¶ 12 (Pet. App. 50a); and that all-White human models were featured in ads for predominately White buildings or neighborhoods and all-Black models were featured in ads for predominately Black buildings or neighborhoods. Complaint ¶ 18 (Pet. App. 52a). The Complaint further alleges that the Times, after receiving direct notice from respondents that its practices were illegal, continued to publish single-race advertising. Complaint ¶¶ 14–18 (Pet. App. 51a-52a). These facts are more than sufficient to support respondents' general allegation that the Times "intentionally and maliciously violated their civil rights." Complaint ¶ 22 (Pet. App. 52a).

3. Petitioner misstates the holding of the District Court when it asserts that it held that "the Fair Housing Act requires a 'fair representation' of models by race." *See* Petition at 6. To the contrary, the District Court simply concluded, consistent with the plain statutory language and prior caselaw, that the ultimate issue for the factfinder is whether "the natural interpretation" of the ads published by petitioner indicates a racial preference to the ordinary reader. *See* 726 F. Supp. at 957 (Pet. App. 26a) (citation omitted). In so holding, the District Court recognized that a factfinder could lawfully conclude from proof that the challenged ads contained a paucity of Blacks that the ads conveyed an illegal racial message. 726 F. Supp. at 961 (Pet. App. 34a).

4. Contrary to petitioner's assertions, the Second Circuit's construction of the Act does not compel publishers to impose "mandatory percentages" of minority models, or to investigate each advertiser's intent. *See* Petition at 16, 17. Instead, it merely requires the Times to screen the ads it publishes for racially discriminatory messages. In rejecting petitioner's First Amendment arguments, the Second Circuit took notice of the extensive monitoring procedures the Times already has in place, 923 F.2d at 1004 (Pet. App. 14a-15a), and observed that "[g]iven that this extensive monitoring — for purposes that are both numerous and often quite vague — is routinely performed, it strains credulity beyond the breaking point to assert that monitoring ads for racial messages imposes an unconstitutional burden." 923 F.2d at 1004 (Pet. App. 16a); *see also* Complaint Ex. 2, 3 (Res. App. 13b-16b); *cf.* Complaint Ex. 1 (Res. App. 1b-12b).

REASONS FOR DENYING THE WRIT

I. RESPONDENTS' DISCRIMINATORY ADVERTISING CLAIM IS PLAINLY SUFFICIENT TO SURVIVE A MOTION TO DISMISS

A. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS

Section 3604(c) of the Fair Housing Act prohibits the publishing of any real estate advertising "that indicates any preference, limitation, or discrimination based on race [or] color." 42 U.S.C. § 3604(c). The

Second Circuit did nothing more than allow respondents' claim to proceed on the uncontroversial premise that a reasonable jury could find that petitioner's consistent practice of printing and publishing real estate ads with a paucity of Black models in a metropolitan area with a significant Black population indicates a racial preference. 923 F.2d at 1001 (Pet. App. 10a). The alarm raised by petitioner at the possibility of incurring liability for real estate ads that fail to match the precise "percentage" or "proportion" of every protected group under the Act, *see* Petition at 16-17, is simply a straw man. *See* 923 F.2d at 1001 (Pet. App. 10a); 726 F. Supp. at 959 (Pet. App. 30a).

The Second Circuit's standard for discriminatory advertising — the natural interpretation of the ad to the ordinary reader — is supported by the nearly uniform caselaw on the issue. The federal courts have consistently concluded that, as a matter of law, a complaint challenging real estate ads featuring all-White or virtually all-White models, such as those involved in this case, states a cognizable claim under the Act. *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29-30, 34-35 (D.C. Cir.), *cert. denied*, 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991); *Ragin v. Steiner, Clateman and Assocs., Inc.*, 714 F. Supp. 709, 713 (S.D.N.Y. 1989); *Spann v. The Carley Capital Group*, 734 F. Supp. 1, 3 (D. D.C. 1988); *Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1058 (E.D. Va. 1987); *Fenwick-Schafer v. Sterling Homes Corp.*, No. R-90-1376, slip op. at 10 (D. Md. Mar. 28, 1991); *see also* 24 C.F.R. §§ 109.10; 109.16(a)(1); 109.25(c); 109.30(b). The only decision supporting the Times' position is a solitary District Court opinion now on appeal to the United States Court of Appeals for the Sixth Circuit. *See Housing Opportunities Made Equal v. The Cincinnati Enquirer, Inc.*, 731 F. Supp. 801 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir.).

The principal case relied upon by the Times — the District Court's decision in *Spann v. Colonial Village, Inc.*, 662 F. Supp. 541, 546 (D. D.C. 1987), *rev'd in relevant part and remanded*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991), and quoted throughout the petition — was reversed by the Court of Appeals on the precise liability point for which the Times cites it. *See Colonial Village*, 899 F.2d at 29-30. In *Colonial Village*, the District Court had dismissed claims based on a developer's and an advertising agency's all-White advertising practices on statute of limitations grounds. The District Court indicated that in order to state a claim under Section

3604(c), the plaintiffs would have to show either that the racial preference was "obvious from the ad itself" or "that such preference be ascertainable through extrinsic circumstances." *Colonial Village*, 662 F. Supp. at 546.

The Court of Appeals' disagreement with the District Court's intent or extrinsic circumstances standard is apparent from the opinion. *See Colonial Village*, 899 F.2d at 29-30. Reversing the District Court's findings that the all-White advertising claims were untimely, *see id.* at 34-35, the District of Columbia Circuit adopted the ordinary reader standard, and expressly remanded the proceeding for a jury trial on the question of whether all-White advertising by itself violates Section 3604(c). *Id.* at 29-30, 34-35; *see also id.* at 29-30 (recognizing that it is a "question of fact for [the] jury whether all-white advertisements violate 42 U.S.C. § 3604(c)" (citing *Ragin v. Steiner, Clateman and Assocs., Inc.*, 714 F. Supp. 709, 713 (S.D.N.Y. 1989)). The defendants in the *Colonial Village* case sought certiorari on the same questions the Times now seeks to raise, and the Court denied certiorari. *See* 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991).

In light of this reversal, the District Court's decision in *Housing Opportunities Made Equal v. The Cincinnati Enquirer, Inc.*, 731 F. Supp. 801 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir.) — also relied on heavily by petitioner — fails for the same reasons. In that decision, the District Court placed almost singular reliance on the extrinsic circumstances or intent analysis contained in the District Court decision in *Colonial Village*. *See id.* at 803-04. However, less than a month after the *Cincinnati Enquirer* decision was issued, the District of Columbia Circuit reversed in relevant part the District Court's holding in *Colonial Village*. Moreover, the District Court's interpretation of the *Saunders* and *Steiner, Clateman* cases as requiring extrinsic evidence of intent, *id.* at 804, is contrary to the plain language of those decisions. *See Saunders*, 659 F. Supp. at 1058; *Steiner, Clateman*, 714 F. Supp. at 713.

The Times' description — or omission — of the other lower court precedents is equally inaccurate. *See Saunders*, 659 F. Supp. at 1058 (applying the ordinary reader standard and holding that virtually all-White real estate ads indicate a racial preference to the ordinary reader); *Steiner, Clateman*, 714 F. Supp. at 713 (holding that all-White human model real estate advertising states a viable claim under Section 3604(c));

Carley Capital, 734 F. Supp. at 3 (holding that all-White human model advertising states a claim); *Fenwick-Schafer v. Sterling Homes Corp.*, No. R-90-1376, slip op. at 5-6, 10 (D. Md. Mar. 28, 1991) (holding that all-White ads can indicate a racial preference to the ordinary reader); *cf. United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.) (applying the ordinary reader standard and holding that it "would severely undercut the objectives of the [Fair Housing Act]" to permit subtle forms of racial preference to be used in substitution for more blatant discriminatory phrases), *cert. denied*, 409 U.S. 934 (1972).

The purported conflict among the courts alleged by petitioner, therefore, does not exist.

B. THE SECOND CIRCUIT'S DECISION IS SUPPORTED BY LONGSTANDING ADMINISTRATIVE INTERPRETATION

Contrary to petitioner's assertion that the Second Circuit "did not base its interpretation of Section 3604(c) on the HUD regulations," *see* Petition at 15 n.10, the Second Circuit expressly stated that it was relying on the HUD regulations "as additional support for the view that racial messages conveyed by the use of human models are not exempted" from the scope of Section 3604(c). 923 F.2d at 1000 n.1 (Pet. App. 7a n.1).

Since 1972, HUD has expressly interpreted Section 3604(c) to prohibit the use of human models in real estate ads to indicate racial exclusiveness, and its regulations directly support respondents' claim here. *See* 37 Fed. Reg. 6700 (1972); 45 Fed. Reg. 57102 (1980). HUD's regulations provide that "[h]uman models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race [or] color" and "should be clearly definable as reasonably representing majority and minority groups in the metropolitan area." 24 C.F.R. § 109.30(b); *see also* 24 C.F.R. § 109.25(c) (discussing examples of the discriminatory use of human models in violation of Section 3604(c)).

Contrary to petitioner's suggestion that the regulations are "precatory," *see* Petition at 15 n.10, HUD is "the federal agency primarily assigned to implement and administer" the Act, and its "interpretation of the statute ordinarily commands considerable deference." *Gladstone*,

Realtors v. Village of Bellwood, 441 U.S. 91, 107 (1979); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (HUD's interpretation "is entitled to great weight") (citations omitted). The statutory language of Section 3604(c) broadly prohibits all forms of racially discriminatory advertising practices and makes no exception for the use of discriminatory pictures. Given that the Act must be construed broadly to effectuate Congress' purpose to provide "for fair housing throughout the United States," 42 U.S.C. § 3601 (1982); *Trafficante*, 409 U.S. at 209, it is clear that HUD's interpretation of Section 3604(c) to apply to the discriminatory use of human models is reasonable, not contrary to clear congressional intent, and thus must be followed here. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984); *see also Hunter*, 459 F.2d at 215 n.11 (citing the HUD regulations in support of its conclusion that newspapers are explicitly subject to the Act); *Steiner, Clateman*, 714 F. Supp. at 713 n.3 ("use of all white human model display advertising is contrary to H.U.D. regulations which are entitled to deference"); *Spann v. Colonial Village, Inc.*, 124 F.R.D. 1, 3 (D. D.C. 1988) ("[t]he regulations are of course entitled to substantial deference by the Court when interpreting the Fair Housing Act") (citation omitted), *rev'd on other grounds and remanded*, 899 F.2d 24 (D.C. Cir.) *cert. denied*, 111 S. Ct. 508, 509 (1990) and 111 S. Ct. 751 (1991).

C. THE FIRST AMENDMENT DOES NOT SHIELD COMMERCIAL SPEECH THAT INDICATES A RACIAL PREFERENCE

Contrary to the overstated First Amendment claims of petitioner, the Second Circuit's decision does not in any way affect a news publisher's editorial independence, but rather involves the Times' highly lucrative and purely commercial real estate advertising section. *See* 923 F.2d at 1002-1003 (Pet. App. 11a-14a).[2] As this Court recently emphasized,

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2. The Second Circuit properly recognized that, as a newspaper, petitioner is accorded no special immunity from compliance with the Act. *See* 923 F.2d at 1003-1004 (Pet. App. 13a-14a). Indeed, this Court recognized just last month that it is "beyond dispute that '[t]he publisher of a newspaper has no special immunity from the application of general laws.' " *Cohen v. Cowles Media Co.*, 59 U.S.L.W. 4773, 4775 (U.S. June 24, 1991 No. 90-634)(quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)); *see also* 726 F. Supp. at 962 n.1 (Pet. App. 37a n.1).

commercial speech is accorded only " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989)(quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)). Moreover, it is beyond dispute that illegal commercial speech receives no First Amendment protection. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-64, 566 (1980).

As the Second Circuit correctly observed, the Court has already rejected petitioner's argument that the First Amendment protects a newspaper's publication of discriminatory advertisements. *See* 923 F.2d at 1003 (Pet. App. 12a). In *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), a newspaper violated an ordinance prohibiting gender-based employment advertising by printing ads under sex-designated columns. In upholding the ordinance over the newspaper's First Amendment challenge, the Court found that such ads are not protected by the First Amendment, even though the ads were discriminatory only by "implication" and not "overtly." *See id.* at 387-89.

Similarly, the Times' argument that it is merely the passive publisher of the content-based decisions of third parties has already been squarely rejected. A "newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own," and this argument has no greater force in the commercial speech or discrimination context. *See id.* at 386.

Finally, there is no authority for petitioner's argument that the ordinary reader standard adopted by the Second Circuit is too vague under the First Amendment. *See* Petition at 19. Indeed, just last year, the Court held that even with respect to a newspaper editorial, the legal standard for determining whether the newspaper is liable for defamatory opinions is "whether reasonable readers would have actually interpreted the statement as implying defamatory facts." *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2710 n.3 (1990) (Brennan, J., dissenting) (stating unanimous aspect of decision); *id.* at 2707 (majority opinion) (test is whether statement "reasonably implies" defamatory facts or contains "false

connotations"). This reasonable reader standard, which newspapers must follow in publishing opinions about matters of public concern, is no more standardless or difficult to apply than the ordinary reader standard applied by the Second Circuit to determine liability for racially discriminatory advertising.

II. REVIEW OF THE INTERLOCUTORY DECISION BELOW IS PREMATURE

As the Second Circuit merely held that respondents' complaint is sufficient to withstand a threshold motion to dismiss, there is no reason for the Court to consider this case at this time. The petition also raises constitutional issues which should not be ruled upon because the case can be resolved on other grounds. *See, e.g., Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-69 (1947); *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

Reluctance to review interlocutory decisions is a time-honored principle followed by the Court in exercising its discretion to grant certiorari. Absent "extraordinary inconvenience and embarrassment in the conduct of the cause," the Court has traditionally declined to review decisions that do not finally resolve the litigation. *American Constr. Co. v. Jacksonville, Tampa, and Key West Ry. Co.*, 148 U.S. 372, 384 (1893). Lack of finality is often by itself "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Finally, the Court should deny certiorari in this case to give other courts an opportunity to rule in similar pending cases. *See Housing Opportunities Made Equal v. The Cincinnati Enquirer, Inc.*, 731 F. Supp. 801 (S.D. Ohio 1990), *appeal pending*, No. 90-3176 (6th Cir.); *Ragin v. Steiner, Clateman & Assocs., Inc.*, 714 F. Supp. 709 (S.D.N.Y. 1989) (trial to commence in Nov. 1991). Even if there were ultimately a need for the Court to address the issues raised by petitioner, the Court should allow the lower courts time to address those issues first. *See, e.g., Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., commenting on a denial of certiorari).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
July 22, 1991

Respectfully submitted,

/s/ Kathleen M. Comfrey

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APPENDIX

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August 4, 1986

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Dear Kerry:

This letter sets forth the agreement we have reached in settlement of the real estate display advertising claims you have raised on behalf of the Fair Housing Council of Greater Washington, the Metropolitan Washington Planning & Housing Association, Inc., and Girardeau A. Spann.

By August 5, 1986, the Post will issue a policy statement regarding its commitment to nondiscriminatory equal housing opportunity in real estate advertising. The policy will be sent to all advertisers who placed real estate display advertisements during the first six months of 1986 and will be sent to all new advertisers who place real estate display advertisements in *The Post* during the next three years. The policy will specify the following positions on logos and human models, to become effective as of the September 5, 1986 editions.

Logos

Advertisements of four column inches or larger must display the Equal Housing Opportunity logo, which includes the "Equal Housing Opportunity" slogan, published at 24 C.F.R. § 109.30(a), or the substance of the following statement:

> "We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the Nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, or national origin."

The logo in such advertisements must meet the following minimum size requirements:

i. 2" x 2" in half page or larger;

ii. 1" x 1" in one-eighth page to half page;

iii. 1/2" x 1/2" in four column inches to one-eighth page.

All logos or statements must be clearly visible, and must be printed in display face roughly equivalent to other print found in the advertisement.

The Post will include in its Saturday real estate display advertising section the substance of the following Equal Housing Opportunity statement:

> "All real estate advertised herein is subject to the Federal Fair Housing Act of 1968 which makes it illegal to indicate "any preference, limitations, or discrimination based on race, color, religion, sex or national origin, or an intention to make any such preferences, limitations, or discrimination based on race, color, religion, sex or national origin, or an intention to make any such preferences, limitation, or discrimination."
>
> "We will not knowingly accept any advertising for real estate which violates the law. All dwellings advertised are available on an equal opportunity basis."

Human Models

Real estate display advertisements that depict human models who are racially identifiable, excepting only those humans obviously not

depicted as residents or potential residents, should reflect an approximate cross-section of the greater Washington, D.C. metropolitan area population, and to that goal must meet the following criteria:

1. In advertisements for a particular residential development or complex that depict a single model, one or two couples, or a single family, at least one out of every four advertisements are to include one or more blacks. (For advertisements for multiple developments or no particular development, this criterion will be applied according to the firm, owner or developer placing the ads.)

2. In each advertisement depicting three or more individuals, not falling within the first category, blacks must constitute at least 25% of the human models — *i.e.*, one black in a group of three or four models, two blacks in groups of five to eight models, three blacks in group of nine to 12 models, etc.

3. Black models must be depicted in a manner and setting generally comparable to the depiction of white models in any particular advertisement or series of advertisements placed by the same advertiser.

* * *

Recordkeeping

To carry out the above policy, The Post will perform the following recordkeeping. Beginning August 30, 1986 and for a period of three years, The Post through its real estate advertising sales manager will keep three copies of each Saturday real estate display section (or of whatever day of the week The Post runs the real estate display section if not Saturdays) and of each "Weekend" section. On a weekly basis during this period The Post will record data on the attached form regarding real estate display ads of four column inches in size or larger appearing in the section. Every four months during this period The Post will provide a summary of the weekly data to you (or other designated representative of your clients). Upon request, The Post will make available the copies of the real estate and Weekend sections it has saved and the weekly data forms it has compiled.

Enforcement

The Post will make a good-faith effort to enforce the policy and will give prompt written notice to any advertiser who materially fails to comply with the policy as soon as such non-compliance is discovered by The Post. This notice will also inform advertisers that they must comply with the policy, and that The Post will enforce such compliance. If an advertiser again fails to comply at any time within the three months after the notice, The Post will again write the advertiser and state that the next ad containing human models must include one or more blacks and that any subsequent ads must conform with The Post's policy. In the case of category 2 non-compliance, The Post will also make personal contact with the advertiser to emphasize that the non-complying ad must not be used again. If the non-complying advertiser fails to comply with the notices at any time during the next six months, The Post will notify you of that fact and will either prohibit the advertiser from using human models in its real estate display advertisements or require pre-clearance of such ads with The Post until compliance (including adequate black human models to correct for the past non-compliance) has been demonstrated for a period of three months.

The Post will maintain a file of copies of all notices mailed to non-complying advertisers and will permit you or your representative to inspect that file upon request. The Post will also place responsibility for monitoring compliance in a senior member of its staff. If your clients have questions or concerns about The Post's monitoring or enforcement efforts, including any apparent efforts by advertisers to circumvent the policy, we will be glad to meet with you promptly. You or your clients also agree to meet with The Post to resolve questions or concerns if The Post's policy, monitoring, or enforcement efforts have unreasonable consequences.

It is my understanding that The Post's policy, if implemented as set forth in this letter, will satisfy the concerns of your clients, the Fair Housing Council of Greater Washington, the Metropolitan Washington Planning & Housing Association, Inc., and Girardeau Spann. In consideration for the implementation of the policy and requirements described in this letter, your clients agree not to pursue any legal or other action against The Post regarding the publication of logos and human models in real estate display ads published in The Post to date. It is also

my understanding that you and your clients are working with Journal Newspapers, Inc. so that it will enforce a similar policy. The Post understands that if in any material way it fails to act in accordance with the terms of this letter, your clients will be free to institute litigation to enforce this agreement.

The initial term of this agreement is three years, and it will be extended for an additional two years if during the 12-month period after the initial term ends the number of black human models appearing in The Post's real estate display ads is less than 20% of the total number of such models. The limited term of this agreement does not mean that thereafter The Post intends to be less committed to a policy of non-discriminatory real estate display advertising and to the principle that such advertising should be representative of the racial makeup of the greater Washington, D.C. metropolitan area.

Sincerely,

/s/ Bo Jones
Boisfeuillet Jones, Jr.

Agreed:

/s/ Kerry Alan Scanlon
Kerry Alan Scanlon, Esq.
Washington Lawyers' Committee
for Civil Rights Under Law
on behalf of The Fair Housing Council of
Greater Washington and The Metropolitan
Planing & Housing Association, Inc., and
Girardeau A. Spann

The Washington Post – Real Estate Display Section **Date of Edition** _____

Advtr. (Dev. or firm/owner/ developer)	Logo / Statement			Human Models				Location						
	Conf.	Non-Conf.	None	Cate. 1		Cate. 2		DC	Alex	Arl.	Frfx	Mtgy	PG	Ot.
				#Wh	#Blk	#Wh	#Blk							

Developments or Firms/Owners/Developers Advertising in The Washington Post

For 3 months period from _____ - _____

Advtr.	# of Ads	# w/ Conf. Logos	# w/ Non. Conf. Logos	# w/ no Logos	Cate. 1 Ads	Category 1 Ads		Cate. 2 Ads	Category 2 Ads	
						#Blk	#Wh		#Blk	#Wh

Noncompliance Notices Sent

For 3 month period from _____ - _____

Advertiser	1st or 2nd Notice	Date and Category of Non-Complying Ad	Date of Notice

The Washington Post
1150 15th Street, N.W.
WASHINGTON, D.C. 20071
(202)334-6000

JAMES E. CUMMINS
SALES MANAGER
REAL ESTATE
334-7639

August 5, 1986

Dear Advertiser:

This letter is to inform you that The Washington Post is adopting a policy with very specific standards regarding human models and logos/ statements in real estate display advertising. The policy is attached and will become effective as of the Friday, September 5, 1986, editions of the newspaper.

The Post is adopting specific standards at this time because experience has shown that a policy of general principles alone has not worked well.

We approach this problem with an awareness of the history of housing advertising in the Washington, D.C. area. Until the early 1960s newspapers here carried separate "colored" listings in the classified section, and they allowed advertisements with explicit or subtle racial preferences during the 1960s.

In 1973, in response to complaints, The Post took affirmative measures to ensure that advertisements connoted non-discriminatory housing opportunity. The real estate department was instructed that human models in real estate display advertising must not have the effect of signaling an intent to practice racial discrimination, and accordingly that models used in a series of such advertisements could not be solely of one race, but rather must contain a mixture so as to negate any possible mistaken inference of racial preferment. Advertisers were encouraged to make prominent use of the equal housing opportunity logo, as many

already did. The Post itself placed its Equal Housing Opportunity statement in a more prominent position in the display advertising section and included the statement with greater frequency and intervals throughout the section.

Since then, The Post has on occasion called advertisers' attention to the human model provisions of H.U.D.'s "Fair Housing Guidelines," which state that models should reasonably represent majority and minority groups in the metropolitan area.

Recently, however, representatives of fair housing organizations which have monitored display advertising in The Post during the last year called our attention to the fact that the use of black human models has not been close to proportionate to this group's representation in the D.C. metropolitan area. These organizations also found that few ads contained Equal Housing Opportunity logos or statements conforming with the standards suggested by H.U.D.'s guidelines. The purpose of the logos and statements, of course, is to inform the reader that property is available to persons regardless of race, etc.

As a result of these statistics, The Post agreed with the fair housing organizations that specific standards were now necessary, and that The Post would monitor compliance by advertisers. While there may be differing opinions on what the specific standards ought to be, I think people will agree that those adopted by The Post are reasonable. If you have any questions regarding the policy, you should not hesitate to get in touch with me or others in the real estate display department.

Sincerely,

/s/ James E. Cummins

James E. Cummins

Attachment

The Washington Post Policy on Human Models and Logos In Real Estate Display Advertisements

Human Models

Real estate display advertisements that depict human models who are racially identifiable, excepting only those humans obviously not depicted as residents or potential residents, should reflect an approximate cross-section of the greater Washington, D.C. metropolitan area population, and to that goal must meet the following criteria:

1. In advertisements for a particular residential development or complex that depict a single model, one or two couples, or a single family, at least one out of every four advertisements are to include one or more blacks. (For advertisements for multiple developments, or no particular development, this criterion will be applied according to the firm, owner or developer placing the ads.)

2. In each advertisement depicting three or more individuals, not falling within the first category, blacks must constitute at least 25% of the human models — *i.e.*, one black in a group of three or four models, two blacks in groups of five to eight models, three blacks in group of nine to 12 models, etc.

3. Black models must be depicted in a manner and setting generally comparable to the depiction of white models in any particular advertisement or series of advertisements placed by the same advertiser.

Logos

Advertisements of four column inches or larger must display the Equal Housing Opportunity logo, which includes the "Equal Housing Opportunity" slogan, published at 24 C.F.R. § 109.30(a), or the substance of the following statement:

> "We are pledged to the letter and spirit of U.S. policy for the achievement of equal housing opportunity throughout the Nation. We encourage and support an affirmative advertising and marketing program in which there are no barriers to obtaining housing because of race, color, religion, sex, or national origin."

The logo in such advertisements must meet the following minimum size requirements:

i. 2" x 2" in half page or larger;

ii. 1" x 1" in one-eighth page to half page;

iii. 1/2" x 1/2" in four column inches to one-eighth page.

All logos or statements must be clearly visible, and must be printed in display face roughly equivalent to other print found in the advertisement.

8/4/86

THE NEW YORK TIMES COMPANY
229 West 43 Street
New York 10036

Dear Advertiser:

It is a cornerstone of The New York Times advertising acceptability policy that discriminatory advertising is unacceptable for publication. The Times also aware that discriminatory policies may at times be communicated in subtle ways — ways that the most careful advertising review procedures might not catch.

The Times has recently received complaints that certain real estate advertising published in The Times does not comply with federal and state fair housing laws and regulations.

For example, it has been pointed out that some ads do not carry the "Equal Housing Opportunity" tag line, while other ads appear not to be in compliance with the regulations' guidelines for use of professional models.

While it is not the intention of The Times to usurp the role of government agencies in enforcing the law, we steadfastly believe that our policies must reflect both the requirement and spirit of the fair housing laws.

Accordingly, The Times has taken the following steps:

- With our 1988 Classified Rate cards, The Times has included a reminder and reference to federal Fair Housing Act regulations. Additionally, The Times's advertising acceptability standards, which already prohibit discriminatory ads has been amended to incorporate by specific reference the requirements of the Fair Housing Act and other laws against discrimination.

- All real estate advertising contracts will also refer advertisers to federal and state legal requirements, as well as to The Times's acceptability standards. We urge all real estate advertisers and advertising

agencies to review the Fair Housing Act regulations to ensure that their ads are in compliance with both the letter and spirit of the law.

- Effective January 1, 1988, The Times will require that all real estate display ads include the "Equal Housing Opportunity" tag line recommended by the federal regulations. Ads which fail to include this statement will be rejected.

- Finally, we intend to notify our fellow publishers in the New York Metropolitan area of the foregoing and will urge them to adopt similar measures.

While you have already received the 1988 rate card, we are enclosing an additional rate card to bring to your attention its reminder and reference to the federal Fair Housing Act requirements.

We know that you join us in the desire to make fair housing practices a reality in the New York Metropolitan area.

/s/ Robert P. Smith

Robert P. Smith
Advertising Acceptability Manager

STANDARDS OF ADVERTISING ACCEPTABILITY

THE NEW YORK TIMES

The following describes some of the kinds of advertising which The Times will not accept:

1. Generally

- Advertisements which contains fraudulent, deceptive, or misleading statements or illustrations.
- Attacks of a personal character.
- Advertisements that are overly competitive or that refer abusively to the goods or services of others.

2. Investments

Advertisements which do not comply with applicable federal, state and local laws and regulations.

3. Occult Pursuits

Advertisements for fortune telling, dream interpretations and individual horoscopes.

4. Foreign Languages

Advertisements in a foreign language (unless an English translation is included) except in special circumstances and when a summary of the advertisement in English is included.

5. Discrimination

Advertisements which fail to comply with the express requirements of federal and state laws against discrimination, including Title VII and the Fair Housing Act, or which otherwise discriminate on grounds of race, religion, national origin, sex, age, marital status or disability.

6. Offensive to Good Taste

Indecent, vulgar, suggestive or other advertising that, in the opinion of The Times, may be offensive to good taste.

This list is not intended to include all the types of advertisements unacceptable to The Times. Generally speaking, any other advertising that may cause financial loss to the reader, or injury to his health, or loss of his confidence in reputable advertising and ethical business practices is unacceptable.

RETAIL ADVERTISING

1. Competitive Claims

A. Statements or representations which disparage the goods, price, service, business methods or advertising of any competitor by name are not acceptable.

B. Statements which make or imply unsupportable claims that an advertiser will undersell competitors are not acceptable.